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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 207

RETAIL CLERKS UNION, 1550,
RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO, et al.,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

THE KROGER CO.,

Intervenor.

BRIEF OF THE KROGER CO., INTERVENOR, IN OPPOSITION TO PETITIONERS' APPLICATION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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OPINIONS BELOW

The decision and order of the National Labor Relations Board dismissing the complaint against the Intervenor in its entirety (JA 388-395), including the Intermediate Report of the Trial Examiner recommending dismissal of the complaint in its entirety (JA 396-407), is reported at 141 NLRB 564 (1962). The opinion of the Court of

Appeals, which the Petitioners seek to review, is reported at 330 F. (2d) 210, and is also reproduced in Appendix A annexed to the Petition for Writ of Certiorari.

JURISDICTION

The Petitioners have invoked the jurisdiction of this Court under 28 U. S. C. 1254(1) and Section 10(f) of the National Labor Relations Act, as amended.

QUESTION PRESENTED

Whether the court below erred in affirming dismissal by the National Labor Relations Board of a complaint filed by the Petitioners alleging that Kroger, the Intervenor Employer, had refused to bargain collectively in good faith with the Petitioners in violation of Sections 8(a)(1) and (5) of the National Labor Relations Act, as amended.

STATUTES INVOLVED

The provisions of the National Labor Relations Act, as amended, involved in this proceeding are Sections 7 and 8(a)(1) and (5) (61 Stat. 136; 29 U. S. C. §§ 151, et seq.). Copies of these sections have been annexed to the Petition for Certiorari as Appendix B thereof.

STATEMENT OF THE CASE

The Petitioners charged, and the complaint issued by the National Labor Relations Board against the Intervenor, The Kroger Co., a food retailing chain, alleged that Kroger had violated Sections 8(a)(1) and (5) of the National Labor Relations Act, as amended, by failing to execute a collective bargaining agreement embodying certain agreements reached between the Petitioners and certain other food retailing employers assertedly linked with Kroger in a multi-employer bargaining unit.

In deciding whether Kroger had refused to bargain in good faith by declining to execute the same collective bargaining agreement as its competitors, the Board reviewed the history of bargaining from 1945 until 1962, when the alleged violation occurred. Based upon this review of the bargaining history, as disclosed by voluminous testimony and documentary evidence, the Board concluded, in agreement with its Trial Examiner, that:

> "The evidence, we believe, justifies a finding . . . that in jointly negotiating for a collective-bargaining agreement, the parties mutually understood that individual variances in the agreement could be negotiated by the individual parties. Accordingly, in refusing to accede to the pension plan agreed to by other employers and in insisting upon separate negotiations of this issue [Kroger] exercised a prerogative established by past practice and did not therefore refuse to bargain in violation of Section 8(a)(5) and (1) of the Act." (JA 394)

The Board did not purport to establish any new principle of law. It simply concluded that under the circumstances disclosed by the evidence, Kroger had no obligation to sign the same agreement as its competitors and did not refuse to bargain in good faith when it declined to do so and requested separate negotiation of the pension issue. Kroger requested separate negotiation of this issue because Kroger, unlike its competitors, already had a generous profit sharing retirement plan in operation on a company-wide basis.

The Petitioners, acting under the provisions of Section 10(f) of the Act, appealed the Board's dismissal to the Court of Appeals for the District of Columbia. The court duly reviewed the Board's decision and concluded that it was supported by substantial evidence on the record considered as a whole. Accordingly, the court ruled that,

"The action of the Board in dismissing the complaint is left undisturbed." (Petition for Certiorari, Appendix A, page 12a)

REASONS FOR DENYING THE WRIT

The basic question presented is whether the Court of Appeals erred in sustaining the decision of the Board. Under the Act, the scope of review in NLRB cases is a narrow one. The standard to be applied by the Courts of Appeals and by this Court, under the 1947 amendments to Sections 10(e) and (f) of the Act, was summarized by this Court in its unanimous opinion in *NLRB* v. *Pittsburgh Steamship Co.* (1951) 340 U.S. 498; 95 L.E. 479, at pages 502-503, as follows:

> "Were we called upon to pass on the Board's conclusions in the first instance or to make an independent review of the review by the Court of Appeals, we might well support the Board's conclusion and reject that of the court below. But Congress has charged the Courts of Appeals and not this Court with the normal and primary responsibility for granting or denying enforcement of Labor Board orders. 'The jurisdiction of the court [of appeals] shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review . . . by the Supreme Court of the United States upon writ of certiorari. . . .' Taft-Hartley Act § 10(e), 61 Stat. 148, ch 120, 29 USC (Supp III) § 160(e). Certiorari is granted only 'in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.' Layne & Bowler Corp. v. Western Well Works, 261 US 387, 393, 67 L ed 712, 714, 43 S Ct 422; Revised Rules of the Supreme Court of the United States, Rule 38 (5). The same

considerations that should lead us to leave undisturbed, by denying certiorari, decisions of Courts of Appeals involving solely a fair assessment of a record on the issue of unsubstantiality, ought to lead us to do no more than decide that there was such a fair assessment when the case is here, as this is, on other legal issues.

"This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way. It is not for us to invite review by this Court of decisions turning solely on evaluation of testimony where on a conscientious consideration of the entire record a Court of Appeals under the new dispensation finds the Board's order unsubstantiated. In such situations we should 'adhere to the usual rule of non-interference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations.'"

In *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.* (1949), 336 U.S. 271; 93 L.E. 672, this Court also emphasized, at page 275, that:

"A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error."

In the instant case, both the Trial Examiner and the Board itself, after thorough review of an extensive record, found as a matter of fact that:

". . . during the entire period of multi-employer bargaining, individual employers and individual unions had negotiated individual modifications in the jointly

> negotiated agreements without protest from other parties to the agreements."

and that:

> "The evidence, we believe, justifies a finding, as in the *J & H Food* case, that in jointly negotiating for a collective-bargaining agreement, the parties mutually understood that individual variances in the agreement could be negotiated by the individual parties." (JA 394)

In reviewing the decision at the request of the Petitioners, the Court of Appeals for the District of Columbia made a fair assessment of the record, and concluded that there was substantial evidence in the record considered as a whole to support these findings of the Board. In so doing, the court adhered to the standards set forth by Congress in Sections 10(e) and (f), and by this Court in *NLRB* v. *Pittsburgh Steamship Co., supra.* In its opinion, the court below stated:

> "In reviewing the result the Board reached by this means, we think our function is limited to determining whether there was sufficient evidence in the record to support the Board on both these points, that is to say, whether the group bargaining arrangements here involved were understood by the participants in them as operating to require contract uniformity under all circumstances, and whether, if there be no such understanding, Kroger acted with appropriate speed and clarity so as not to mislead the Union under the particular circumstances of the 1961 negotiation." (Petition for Certiorari, Appendix A, page 6a)

The court observed that the Board had "measured Kroger's asserted statutory derelictions" in the light of the "facts" revealed in the record. The court said:

> "It was from these facts, and not from any legal abstraction, that [the Board] inferred an understanding between the parties that these group discussions need not result in identical agreements and that, accordingly, an individual employer or an individual local might, by timely action taken in good faith, reserve its position on a particular matter in such manner so as not to be bound at all events by what a majority of their associates might agree to." (Petition for Certiorari, Appendix A, pages 5a-6a)

The court found that the Board's findings were not "arbitrary or lacking in substantial record foundation." (Ibid., page 7a)

The court also observed that:

> "The Board has appraised the conduct of Kroger in the light of factual findings amply supported by evidence in the record, and it has concluded that that conduct does not transgress the statutory mandates. In reaching this conclusion, the Board has adhered to the salutary practice it has established of examining these multi-unit situations on a case-by-case basis." (Ibid., page 11a)

The court said that the Board had decided the case in the "spirit of fact rather than form" and that "the Board has wisely looked to the facts of the particular case in deciding whether a complaint about reprehensible conduct is justified." (Ibid., page 11a)

The court also emphasized, in footnote 5, that:

> "We do, of course, take into consideration the expertise of the Board. Its continuous exposure to the business of extracting a kernel of probable truth from special factual settings, which the Board observes more often and more closely than do we, gives it a facility and understanding worthy of respect. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951)."

From the foregoing, it is evident that this case presents no novel question of law. It involves no "principles the settlement of which is of importance to the public" and involves no "real and embarrassing conflict of opinion and authority between the circuit courts of appeal." The essence of the Petitioners' contention to this Court is that there was not sufficient evidence of past practice before the Board from which the Board could properly infer that Kroger had a right under the agreement and understanding between the parties to insist upon separate negotiation of the pension issue. This is obviously a factual question not subject to review in this Court.

The only decision of this Court on which the Petitioners rely is *NLRB* v. *Truck Drivers Local Union No. 449* (1957) 353 U.S. 87; 1 L.E. (2d) 676, familiarly known as the "*Buffalo Linen* case." In that case, this Court decided that employers who are bargaining on a group basis have a right to shut down their operations in concert when a union attempts to weaken the solidarity of the group by striking less than all of its members. There is no inconsistency between the *Buffalo Linen* decision and the decision of the Board in the instant case. This case does not involve an attempt by the Union to break up a group of employers who want to bargain jointly. Also, there is no contention here that a group of empoyers has tried to divide-and-conquer an opposing union group. There is no possible inconsistency in holding that bargaining groups may not seek to undermine and destroy each other, but that individual members of bargaining groups may, with fair notice to all concerned, voluntarily withdraw authority from the group committee to represent the individual member of the group and may insist thereafter upon bargaining on an individual basis.

It is elementary that the Act itself makes no reference to multi-employer or group bargaining. Section 9(b) of the Act specifies that the "unit appropriate for the purposes of

collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." Section 2(2) defines the term "employer" as including "any person acting as an agent of an employer." Thus, agency is the true basis of multi-employer bargaining. This means that a group of employers or a group of unions may lawfully bargain together and enter into agreements binding on the members of the group only so long as the committees negotiating for the groups are acting as agents of the members of the groups. In *Arden Farms* (1957) 117 NLRB 318, 319; aff. (1957) 118 NLRB 117, the Board stated:

> "It is well established that presumptively a single-employer unit is appropriate, and to defeat a claim for such a unit in favor of a broader unit a controlling history of collective bargaining on the broader basis must exist."

In *California Metal Trades Assoc.* (1947) 72 NLRB No. 120; 19 LRRM 1221, the Board said, at page 1222:

> "The broadest unit which the Board is empowered to find appropriate under Section 9(b) of the Act is the 'employer unit.' The term 'employer' is here used as defined in Section 2(2) of the Act, that is, it 'includes any person acting in the interest of an employer.' "

The Board has repeatedly held that employers are free to withdraw from multi-employer bargaining with appropriate notice at any time up until the actual conclusion of final agreement. *Texlite, Inc.* (1958) 119 NLRB 1792; enf. (CA 5; 1959) 266 F. (2d) 349; *Indiana Limestone Co.* (1962), 136 NLRB 697; *Rice Lake Creamery Co.* (1961), 131 NLRB 1270; aff. (CA D.C.; 1962) 302 F. (2d) 908; *Cooks, Waiters and Waitresses Union, Local 327* (1961) 131 NLRB 198; *Clackamas Logging Co.* (1955) 113 NLRB 229, 235; *Matter of Paschich* (1950) 91 NLRB

1552, footnote 4; *Bagley Produce Co.* (1954) 108 NLRB 1267.

Of course, a union is equally free to withdraw at any appropriate time, with notice, from participation in multi-employer bargaining. *Evening News Assoc. and Detroit Newspaper Printing Pressmen's Union Local 13* (Trial Examiner's Intermediate Report) 56 LRR 145 (June 8, 1964).

In its Petition for Certiorari, the Petitioners state, at page 12:

> "We do not suggest that at each contract reopening employers and unions could not agree to bargain in this fashion consistent with the obligations imposed upon them by Sections 8(a)(5) and 8(b)(3) of the Act."

Thus, the Petitioners acknowledge that there is not really any novel question of law involved and that group bargaining finds its basis in familiar principles of agency and contract law. The Board has found, in substance, that Kroger did not violate any agreement or understanding of the parties in insisting upon separate negotiation of the pension issue.

The only Court of Appeals decision relied on by the Petitioners in claiming a conflict between the Circuits is *Pacific Coast Association of Pulp and Paper Manufacturers* v. *NLRB* (1961) 133 NLRB 690; enf. (CA 9; 1961) 304 F. (2d) 760. There is no conflict. In the *Pacific Coast* case, the employer was a member of an employer association which was clearly authorized to represent all member companies as bargaining agent in what was admittedly a multi-employer unit. The employer committee refused to discuss the subject of pensions. The Board found this to be a violation of Section 8(a)(5). In his Intermediate Report, at page 7, lines 18-22, the Trial Examiner stated:

> "Nor is it questioned that the Association was so constituted that it had the authority to bargain on behalf of its members on all mandatory subjects of collective bargaining, and that by a vote of a majority of its members it could bind all of them in whatever agreements it reached with the Union."

In footnote 2 of its decision and order, the Board stated:

> "While an employer is not obligated to make any concession, it is required to discuss issues and make a reasonable effort to reach an agreement (Citing cases). The Respondent Association made no such effort here."

In the *Pacific Coast* case, the employers, as a group, refused to discuss the issue of pensions. In the instant case, Kroger was always willing to discuss the issue of pensions, and did negotiate the subject of pensions, both in the joint negotiations, and individually with the Union after Kroger withdrew from the joint negotiations on February 25, 1962. The issue in the instant case was not whether pensions are negotiable, but whether, under the bargaining practice which had existed in Chicago for many years, Kroger had a right to bargain this subject on an individual basis rather than a joint basis.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

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